[redacted] for Writ
[redacted] States Court
Seventh Circuit

[redacted] IN OPPOSITION TO PETITION FOR [redacted] OF CERTIORARI

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QUESTION PRESENTED

Whether a state prisoner is entitled to federal habeas corpus relief based on an alleged violation of the Interstate Agreement on Detainers ("IAD"), where the state courts found the issue to have been waived as a matter of state law and where the prisoner has not established actual prejudice resulting from the violation.

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No. 93-5418

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN SCOTT REED, Petitioner,

v.

ROBERT FARLEY, Superintendent, Indiana State Prison, et al., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Orrin Scott Reed was charged in Fulton County, Indiana, with theft by defrauding an insurance company with a false report of a stolen truck. Reed was also charged with being an habitual offender under Indiana law.

Reed was in federal prison at the time. Indiana has adopted the Interstate Agreement on Detainers ("IAD"). Ind. Code § 35-33-10-4. Pursuant to a detainer and a subsequent request for temporary custody sent by the Fulton County prosecutor to the warden of the penitentiary, Reed was delivered into the custody of Fulton County officials on April 27, 1983.

At an initial hearing in May 1983, Reed stated that he would prefer to represent himself (with an attorney "as assistant") but that his custody prevented him from preparing for trial. Bond was denied due to his continuing federal custody.

At no time during the 120 days following his arrival in Fulton County did Reed alert the trial court to the possibility that he would not be tried within 120 days as required by Article IV(c) of the IAD,[1] although he had multiple opportunities to do so.

At the initial hearing in May 1983, the judge asked for an estimate of the length of trial, which was to be set in "August, perhaps September." Reed did not object to the possibility of a setting in September. At a pretrial conference on June 27, 1983, the trial court set the trial to begin on September 13, 1983, which would have been the 140th day after Reed's arrival in Fulton County. Reed did not object. At another conference on August 1, 1993, the trial court reset the trial to begin on September 19, 1983. Reed did not object.

Instead, Reed waited until August 29, 1983, the 124th day after his arrival, to file an "Affidavit of Emergency" and "Petition for Discharge," citing for the first time Article IV(c) and its 120-day time limit. At a subsequent conference

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[1] Article IV(c) of the IAD provides that trial of a prisoner transferred under that article

> shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The 120th day after Reed's arrival in Fulton County was August 25, 1983.

the trial judge expressed surprise at Reed's invocation of the 120-day rule. The judge stated that he had not seen any reference to 120 days in any of Reed's motions and that he was not even aware that the IAD contained a 120-day time limit. Reed's motion for discharge was denied.

Rather than specifically objecting to his trial date prior to the running of the 120-day period, the record suggests that Reed deliberately attempted to ambush the trial court. Before and after he arrived in Fulton County, Reed deluged the court with lengthy handwritten motions, some of which mentioned the IAD in a very general and sometimes veiled way. He asserted, for example, that his transfer was "contrary to the authority" of the IAD. He insisted that his trial be held "within legal guidelines" of the IAD and once vaguely referred to the "limited time left for trial."

Reed's ability to cite specific provisions of the IAD is beyond question, for his motions included specific citations to IAD provisions or alleged rights under the IAD other than the 120-day time limit. He argued, for instance, that his transfer was invalid because he did not receive a pretransfer hearing at the federal penitentiary. He also argued that conditions at the county jail violated the obligation to "care" for him under Article V of the IAD.

Reed further aggravated the situation by persistently suggesting to the trial court that he would be better able to prepare his defense after his federal sentence expired, which he first said would occur in August 1983 and later said would

occur about August 31, 1983. The trial court, which originally denied bond due to the federal sentence, eventually set bond conditioned on Reed's release from all other custody. Bond was posted on September 28, 1983.

When the case came on for trial on September 19, 1983, the court and parties expressed concern over a newspaper article about the case. After a lengthy discussion the trial judge stated his inclination to delay the trial one week, but Reed requested that it be delayed until October or November and the trial was reset to begin on October 18, 1983.

Reed was convicted of theft and found to be an habitual offender, resulting in a sentence of 34 years. The Indiana Supreme Court affirmed the conviction. On the IAD issue the court held that Reed had waived his right to trial within 120 days by failing to object to the setting of trial dates beyond the 120-day limit. Reed v. State, 491 N.E.2d 182, 184-85 (Ind. 1986) (Pet. App. A-21 - A-22).

Reed next petitioned for federal habeas corpus relief, which was denied by the district court. The district court found that Reed's contribution to the delay between transfer and trial generally foreclosed his time limit contentions. (Pet. App. A-16 - A-17.) The district court also specifically noted that Reed's claim was not based on the speedy trial guarantee of the Sixth Amendment and that the Indiana Supreme Court's holding that the trial was timely under state law did not contravene the federal Constitution. (Pet. App. A-17 - A-18.)

The court of appeals affirmed, holding that claims under the IAD do not merit federal habeas corpus relief unless the petitioner establishes that the state courts "fail[ed] to entertain and resolve" them. Reed v. Clark, 984 F.2d 209, 213 (7th Cir. 1993) (Pet. App. A-5). Rehearing was denied over the dissent of two of the eleven judges in regular active service. 984 F.2d at 213-14 (Pet. App. A-5 - A-6).

REASONS FOR DENYING THE WRIT

I. REED'S WAIVER OF HIS IAD CLAIM IN THE STATE COURTS PROVIDED AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DENIAL OF RELIEF.

The Indiana Supreme Court did not reach the merits of Reed's 120-day time limit claim under the IAD based on its finding that he had waived it.[2] After discussing the procedural history of the case, the court held:

> A defendant applying for discharge pursuant to the Interstate Agreement on Detainers may be precluded from relief if he fails to object to a date beyond the requisite period at the time the date was set or during the remainder of the time limit. See Scrivener v. State (1982), Ind., 441 N.E.2d 954, 956; Pethtel v. State (1981), Ind. App., 427 N.E.2d 891.

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[2] In his Petition, Reed relies entirely on the 120-day time limit as the IAD violation at issue in this case. The Respondents do not understand the Petition to include Reed's claim, raised in the lower federal courts, that he was entitled to a pretransfer hearing at the federal penitentiary. See Reed v. Clark, 984 F.2d at 213 (Pet. App. A-5).

> Appellant claims all of his objections based on the IAD properly preserve the "120 day limit" issue for appeal. Appellant is incorrect. The relevant times when appellant should have objected were on June 27, 1983, the date the trial was set, and August 1, 1983, the date the trial was reset. However, appellant did not object at these times to the setting or resetting of the trial date beyond the requisite 120 day period. Appellant's Affidavit of Emergency on August 29, 1983, alleging the expiration of the 120 day period did not qualify as a timely objection to preserve his rights under the IAD.

Reed v. State, 491 N.E.2d 182, 185 (Ind. 1986) (Pet. App. A-22).

This Court has long held that it will not consider an issue of federal law on direct review of a state court judgment if that judgment rests on a state-law ground which is both independent of the federal claim and and adequate basis for the court's decision. Harris v. Reed, 489 U.S. 255, 260 (1989). In the context of federal habeas review of state convictions, that rule is expressed in terms of "procedural default," although the roots are the same. Id., 489 U.S. at 262; see Wainwright v. Sykes, 433 U.S. 72 (1988).

The Indiana Supreme Court's holding that Reed had waived his IAD claim was a "plain statement" of its reliance on the adequate and independent state-law ground of waiver. There is no suggestion that the court considered the merits in the alternative, and it relied entirely on Indiana cases in reaching its conclusion.

The Respondents have raised Reed's waiver as an impediment to habeas review at every stage of the federal

litigation.[3] In any event, a State's failure to plead procedural default does not prevent the federal habeas court from invoking the doctrine in the interests of federalism and comity. Granberry v. Greer, 481 U.S. 129 (1987).

This Court should continue to follow its practice of refusing to review cases in which the state courts have relied on the independent state ground of waiver, and for this reason alone should deny certiorari here.

II. AFTER THIS COURT'S DECISION IN BRECHT v. ABRAHAMSON, THERE IS NO MEANINGFUL SPLIT AMONG THE CIRCUITS ON THE ISSUE OF WHETHER A TECHNICAL VIOLATION OF THE IAD WILL MERIT HABEAS CORPUS RELIEF.

The core "conflict" posited by the Petitioner as existing before the court of appeals decided the instant case is between courts which have required a showing of actual prejudice before granting habeas corpus relief based on a violation of the IAD and those which have not. (Petition at 11-13.) Any case holding that prejudice is not required, however, is a dead letter after this Court's decision last Term in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993). In any event, the appearance of a "split" was due to the failure of some courts to separately address the issue of relief.

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[3] Waiver under Indiana law was a key focus of the Respondents' argument in the court of appeals and the district court. See Reed v. Clark, 984 F.2d at 214 (Pet. App. A-5); Memorandum and Order of District Court at 10-11 (Pet. App. A-17 - A-18) (treating Indiana Supreme Court's disposition of issue as based on state law).

A. After Brecht There Is No Doubt That A Technical Violation Of The IAD Will Not Merit Habeas Relief In The Absence Of A Showing Of Actual Prejudice.

Any question about the requirement of actual prejudice in a federal habeas corpus case was resolved by this Court in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), which held that in habeas corpus proceedings the harmlessness of constitutional errors is evaluated under the less stringent standard of Kotteakos v. United States, 328 U.S. 750 (1946). Thus an error asserted in a habeas proceeding must have "had substantial and injurious effect or influence in determining the jury's verdict." 113 S.Ct. at 1722 (quoting Kotteakos, 328 U.S. at 776).

> Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Id. (quoting United States v. Lane, 474 U.S. 438, 449 (1986)).

Any court of appeals decision holding that an IAD violation will merit habeas relief in the absence of a showing of actual prejudice has been effectively overruled by Brecht. If a constitutional error must be deemed harmless in the absence of actual prejudice, there can be no doubt that habeas relief is not available for per se violations of the nonconstitutional provisions of the IAD. Because the issue is controlled by a recent decision of this Court, certiorari should be denied.

B. There Is No Meaningful Split Among The Circuits In Any Event.

An overwhelming majority of the courts of appeals have applied a fairly uniform approach to habeas review of IAD claims, holding that an IAD violation will not merit relief unless the petitioner can establish actual prejudice to his basic right to a fair trial. The requirement of prejudice is based on this Court's precedents, which hold that the mere violation of a "law[] . . . of the United States" does not merit collateral relief unless "the defendant was prejudiced." Davis v. United States, 417 U.S. 333, 346 (1974); see Hill v. United States, 368 U.S. 424, 428 (1962).

Thus in Seymore v. State of Alabama, 846 F.2d 1355, 1359-60 (11th Cir.), cert. denied, 488 U.S. 1018 (1988), the Eleventh Circuit stated that it was joining the First, Second, Fourth, Eighth, Ninth and Tenth Circuits in holding that "various violations of the IAD are nonfundamental defects and -- absent a showing of some sort of prejudice -- are uncognizable in a federal habeas proceeding." 846 F.2d at 1359. In support of this statement the court in Seymore also cited decisions of the Sixth and Third Circuits. See Metheny v. Hamby, 835 F.2d 672 (6th Cir. 1987), cert. denied, 488 U.S. 913 (1988); Casper v. Ryan, 822 F.2d 1283, 1288-91 (3rd Cir. 1987), cert. denied, 484 U.S. 1012 (1988). Thus "actual prejudice" has been the uniform standard for habeas relief in nine of the circuits.

The Petitioner cites cases in which habeas relief was granted on the basis of an IAD violation, but fails to take into account the fact that those cases did not even address the separate issue of whether relief was appropriate, assuming instead that habeas relief is automatically available because the IAD is a "law[] . . . of the United States." See, e.g., Birdwell v. Skeen, 983 F.2d 1332, 1336 (5th Cir. 1993); Webb v. Keohane, 804 F.2d 413, 414 (7th Cir. 1986).

There is no question that the IAD is a federal law which can be the basis for federal jurisdiction to entertain an application for a writ of habeas corpus on the ground that the applicant is in custody in violation of the "laws . . . of the United States" under 28 U.S.C. §§ 2241(c)(3), 2254(a) and 2255. Carchman v. Nash, 473 U.S. 716, 719 (1985). But the habeas court is also required to "dispose of the matter as law and justice require," 28 U.S.C. § 2243, an equitable issue which cases such as Birdwell and Webb simply failed to consider.

The Seventh Circuit in this case recognized that its prior decisions, including Webb, did not address "the circumstances under which [an IAD] violation leads to collateral relief." Reed v. Clark, 984 F.2d at 211 (Pet. App. A-3). Other circuits have also distinguished cases which did not address the relief issue. See Seymore v. State of Alabama, 846 F.2d at 1359 n.7; Metheny v. Hamby, 835 F.2d at 674. If there is disparity in habeas relief granted, see Metheny v. Hamby, 488 U.S. 913, 913-14 (1988) (White, J., dissenting), it is because habeas respondents have not been arguing the relief

issue in every case, not because there are different standards being employed by the circuits.

The Petitioner is wrong, therefore, to characterize the prior state of the law as an "already-fractured split among the circuits" where a review of the cases he cites shows remarkable uniformity in the basic principle. This may be the reason for this Court's denial of certiorari in almost every case cited by the Petitioner, and for the same reason certiorari should be denied here.

III. THE EXTENT TO WHICH HABEAS CORPUS RELIEF IS AVAILABLE IS A MATTER OF STATUTORY CONSTRUCTION WHICH CAN BE RESOLVED BY CONGRESS.

This case does not present the Court with any question of constitutional law -- Reed has never claimed that his right to a speedy trial under the Sixth Amendment was denied. Neither does the case squarely present a question regarding the terms of the IAD itself.

Instead, the Petitioner is asking the Court to answer a question which is fundamentally one of statutory interpretation: What relief is available under 28 U.S.C. § 2254 for a violation of the IAD? As argued above, the courts of appeals have been fairly consistent in their approach. The Respondents are unaware of any effort in Congress to amend Section 2254 to require relief for per se IAD violations.

If the approach taken by the Seventh Circuit in this case is viewed as a departure from Congress' understanding of the scope of the writ of habeas corpus, Congress is free to

amend Section 2254 in a way which would clarify its intent. See Brecht, 113 S.Ct. at 1718-19 (discussing "various proposals" in Congress to affect standards of review in habeas cases). The Court should allow Congress the opportunity to consider the Seventh Circuit's decision and change the statute if it so desires.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT HABEAS REVIEW OF IAD VIOLATIONS TURNS ON WHETHER THE PETITIONER RECEIVED A FULL AND FAIR HEARING IN THE STATE COURTS.

Just last Term the Court reviewed the equitable principles which resulted in the rule of Stone v. Powell, 428 U.S. 465 (1976), which bars habeas corpus consideration of claims based on the Fourth Amendment exclusionary rule unless the petitioner can establish that the state courts did not provide a full and fair opportunity to litigate the issue. In Withrow v. Williams, 113 S.Ct. 1745 (1993), the Court declined to extend Stone to alleged violations of Miranda v. Arizona, 384 U.S. 436 (1966).

The Court reiterated in Withrow that Stone was based on a weighing of the costs of applying the exclusionary rule in collateral proceedings against any potential advantage of applying it there. 113 S.Ct. at 1750; Stone, 428 U.S. at 489-95. Key to this determination is the extent to which the "right" at issue safeguards "a fundamental trial right," 113 S.Ct. at 1753 (quoting United States v. Verdugo-Urquez, 494 U.S. 259, 264 (1990)), which serves "some value necessarily divorced from the correct ascertainment of guilt," 113 S.Ct. at 1753.

The IAD contains precisely the sort of extrajudicial rules which bear no necessary relation to the accuracy or fundamental fairness of the trial. Article I of the IAD itself states that its primary policy is to

> encourage the expeditious and orderly disposition of [untried] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.

IAD, Art. I. The same article condemns "uncertainties which obstruct programs of prisoner treatment and rehabilitation" and "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions." Id.

While compliance with the IAD will usually avert a claim of the denial of a speedy trial under the Sixth Amendment, no court has ever suggested that the IAD is required to protect the Sixth Amendment right in the same sense that Miranda is necessary to safeguard the right against self-incrimination. The Sixth Amendment is self-enforcing, and the mechanistic provisions of the IAD are actually inconsistent with this Court's well-settled, flexible multi-factor analysis of speedy trial claims. See Doggett v. United States, 112 S.Ct. 2686, 2690-91 (1992); Barker v. Wingo, 407 U.S. 514 (1972).

Other provisions of the IAD are even further removed from the determination of guilt or innocence. The Petitioner's approach would permit habeas relief, for example, based on the IAD's provision that a transferred prisoner must be tried

before being returned to the original place of imprisonment. IAD, Art. IV(e). It cannot be seriously argued that this provision is crucial to the fundamental fairness of a trial.

On the other side of the Stone equation are the costs of collateral review, about which there can be no doubt. See, e.g., McCleskey v. Zant, 111 S.Ct. 1454, 1468-70 (1991). These costs are especially heavy in IAD cases, where the only remedy is dismissal with prejudice. Unlike the exclusion of evidence under the Fourth Amendment or Miranda, an IAD violation admits of no possibility of retrial.

Thus the court of appeals correctly concluded that the doctrine of Stone v. Powell applies to federal habeas corpus review of claimed violations of the IAD, and there is no need for this Court to exercise its supervisory authority to correct an erroneous decision of a lower court.

V. REED WOULD NOT BE ENTITLED TO HABEAS RELIEF UNDER ANY STANDARD OF REVIEW.

Review of this case by this Court would be an academic exercise because Reed is clearly not entitled to relief under any standard of review that might be adopted. Even beyond his clear waiver of the issue in the state courts, Reed has never credibly alleged that the failure to try him within 120 days adversely affected his ability to defend himself.

If the delay had any effect at all, it assisted Reed by postponing the trial until after he was released on bond. Reed incorrectly asserts that "the detainer" forced him to

prepare his defense from a jail cell even after his federal sentence expired. (Petition at 5 n.3, 13 n.6.) To the contrary, the trial court granted bond when the federal sentence expired (R. 430) and Reed posted bond on September 28, 1983 (R. 103). Ironically, therefore, the delay in the trial of the case permitted Reed time out of jail to prepare for the trial, which began on October 18, 1983.

Reed has never claimed, nor does he do so in his Petition, that specific evidence or witnesses were lost as a result of the trial of the case in October instead of August. Even if he could establish a technical violation of the 120-day provision, Reed does not even pretend to assert that the error had a "substantial and injurious effect on the jury's verdict" under Brecht, supra. This Court should not utilize its scarce resources to review this case in order to reach the same result reached by the court below, even if on different grounds.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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